Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1979 Term

No. _____

79-577

JAMES DAMERON - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

1979 Term

No. _____

JAMES DAMERON - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, James Dameron prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above styled action on July 5, 1979, and upon which Petition for Rehearing was denied on September 11, 1979.

REFERENCE TO REPORT OF OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals was by per curium opinion which was not reported officially or unofficially. The judgment of the United States District Court was not reported.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

This is a petition seeking review of the Order and Judgment of the United States Court of Appeals for the Sixth Circuit entered on July 5, 1979, affirming the conviction of James Dameron in the United States District Court for the Eastern District of Kentucky. Petition for Rehearing was requested, and was denied by Order entered September 11, 1979. Jurisdiction to review this action on Writ of Certiorari is granted by 28 *U.S.C.* §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

A. Should the fruits of a search pursuant to a search warrant be suppressed where the affidavit in support of said warrant is based upon information obtained by law officers through entry into defendant's home by fraud, deceit and trickery?

B. Are the acts outlined in the evidence, even if taken in a light most favorable to the government, sufficient to constitute criminal attempt within the meaning of 21 *U.S.C.* §846?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions pursuant to which petitioner was convicted are Title 21, Sections 841 and 846, *United States Code,* which read as follows:

Section 841: "Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I of II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of im-

prisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of im-

prisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent of special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law."

Section 846: "Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Petitioner relies for relief upon the protection afforded him pursuant to the *Fourth Amendment to the United States Constitution,* which reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

(A) Proceedings

This action originated upon an indictment returned by a Federal Grand Jury in the Eastern District of Kentucky charging the Petitioner with having violated Title 21, United States Code, Section 841 and 846 in that he attempted to manufacture Phencyclidine, a schedule II non-narcotic controlled substance. Petitioner was tried by jury in the United States District Court for the Eastern District of Kentucky at Pikeville, Kentucky. He was convicted and sentenced to five years imprisonment followed by a special parole term of two years.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the Judgment of the Trial Court. It is from that action which Petitioner now seeks relief.

(B) Statement of Facts

In January 1978, a sign maker named W. B. Young in Ashland, Kentucky, at petitioner's request made several plastic signs which purported to be for the Corbin Company (T.E., pp. 117-124). On March 6, 1978, the petitioner also secured a cashier's check from the First National Bank in Ironton, Ohio, in the amount of Two Thousand Three Hundred Forty-six ($2,346.00) Dollars payable to a chemical firm in Cincinnati, Ohio (T.E., pp. 246, 256). In January of 1978, the petitioner secured the services of an answering service in Ironton, Ohio to take calls for a firm

which he termed the Corbin Company; the petitioner also used the address of the answering service for his company, which was not an unusual practice with the answering service (T.E., pp. 168-188). While in Florida in February, 1978, petitioner purchased a quantity of letterheads, envelopes and business cards for the Corbin Company (T.E., pp. 189-192).

In the early part of March, 1978, the petitioner ordered from a Louisville, Kentucky chemical firm, under the name of the Corbin Company, approximately one hundred twenty-five (125) bottles of piperidine (T.E., pp. 210-211). This purchase order was to be picked up by the petitioner at a later date at the Matheson, Coleman and Bell chemical firm in Cincinnati, Ohio. When the petitioner ordered the above mentioned chemicals from the firm in Louisville, an agent of that firm notified agents of the Federal Drug Enforcement Agency (T.E., pp. 220-224).

The salesman at the chemical firm in Louisville indicated that the chemical, Piperidine, has various industrial uses (T.E., p. 223).

Several chemists testifying for the United States and a chemist testifying for the petitioner indicated that piperidine has many legitimate uses in addition to being one of at least ten chemicals which go to constitute the controlled substance phencyclidine or PCP (T.E., pp. 425-457).

According to a forensic chemist employed by the Drug Enforcement Administration, it is impossible to manufacture phencyclidine with only the chemical piperidine (T.E., p. 439).

All other chemists and/or experts testifying for either party agreed that it is impossible to construct phencyclidine with only piperidine, although all agreed that piperidine is one of from three to ten essential elements of that drug.

On April 4, 1978, agents of the Drug Enforcement Administration were serveilling the Matheson, Coleman and Bell Chemical Company in Cincinnati, Ohio, anticipating that the petitioner would be picking up the above mentioned order of piperidine (T.E., p. 275). At approximately 11:30 a.m. on April 4, 1978, the petitioner came to the parking lot of the Ohio Chemical Company in a green Chevrolet truck with a "Corbin Company" sign attached to the doors of the truck he was operating (T.E., p. 276). The petitioner picked up the quantity of piperidine and drove away from the chemical firm's loading area and immediately removed the license tag from his truck and replaced that license plate with another one; he also removed the Corbin Company signs from the doors of his truck (T.E., pp. 276-279). The Drug Enforcement Administration agents attempted to follow the petitioner and did follow him for a long period of time prior to losing him in the traffic (T.E., p. 281).

In following the petitioner's truck on April 4, 1978, the drug agents were able to ascertain the exact name and address of the petitioner through the registration of his truck based upon a check of the license plate (T.E., pp. 280-281).

During the evening of either April 3 or 4, 1978, Flatwoods, Kentucky, Policeman, Willard Eugene

Fisher, talked to officers of the Drug Enforcement Agency, specifically Larry L. Lakin and Harold Brown, and was advised that the latter named federal agents did not know whether the substance piperidine was in the James Dameron residence (T.E., pp. 3-4).

Officer Fisher was asked to go through the Dameron residence by Patrolman, Bill Kenneth Jesse, also a member of the Flatwoods, Kentucky Police Department (T.E., p. 5).

On April 3 or 4, 1978, Officer Bill Kenneth Jesse met with Agents Lakin and Brown at the police station in Flatwoods, Kentucky (App., p. 71). At that time, Lakin and Brown described in small detail "exactly what was supposed to be happening" (T.E., p. 15).

After the initial conversation with Officer Jesse on either April 3 or 4, 1978, probably on April 4, Lakin and Brown asked Officer Jesse if he would go to the home of James Dameron and Officer Jesse indicated that he would do so (T.E., pp. 16-17).

The Drug Enforcement Officers specifically asked Officer Jesse to see if there were any cartons in Mr. Dameron's house (T.E., pp. 18-19). Officer Jesse indicated that one of the reasons he went to Dameron's house was to see whether the boxes or cartons the D. E. A. Agents suspected of being present in the petitioner's house were in fact there (T.E., pp. 19-20).

Ostensibly, Officers Jesse and Fisher went to and entered the Dameron residence with a realtor to view the premises for the expressed purpose of purchasing it. However, once inside the Dameron house, the two policemen thoroughly and without a search warrant,

went through the house room by room, including the closets, until they found some boxes in a closet (T.E., p. 20). The reason given for opening closet doors and moing clothes and boxes about was to get a better view into the closets, as stated by Officer Jesse, was to look for "bugs" (T.E., p. 21). Jesse, in response to the Trial Judge's questioning said he would have gone into the Dameron residence regardless of whether or not he had ever seen a D.E.A. Officer (T.E., p. 20). However, in brief before the Court of Appeals and in oral argument, the United States Attorney abandoned this position; and frankly admitted the entire purpose of the visit to be the search.

Based upon the data provided by Officers Jesse and Fisher, Agent Larry Lakin prepared an affidavit and obtained a search warrant on April 13, 1978, and pursuant to the search warrant, a search was made of the Dameron residence on April 13, 1978 (T.E., pp. 323-325).

As a result of the search of Mr. Dameron's truck and residence, agents of the D. E. A. secured two magnetic signs of the Corbin Company, a clipboard, a spiral notebook, plastic hard hat, a copy of a check made payable to the Preiser Chemical firm, business cards and letterhead of the Corbin Company, and a purchaser's receipt for a cashier's check from the First National Bank of Ironton, Ohio, payable to the Preiser Scientific firm in the amount of Two Thousand, Three Hundred Forty-six Dollars and Twenty-four cents ($2346.24) (T.E., p. 337).

Agent Lakin also found in Dameron's residence a piece of notebook with some handwritten notes referring to a British patent as well as another handwritten note referring to the telephone number 329-5044 and the name benzene and the name Tom Buyalos (T.E., p. 345). Agent Lakin also found a handwritten note referring to airline schedules in Mr. Dameron's living room (T.E., p. 346). In Mr. Dameron's bedroom, the federal agents found a briefcase containing other handwritten notes which Agent Lakin indicated were "possibly some receipts and some personal papers" (T.E., p. 347). Agent Lakin also found a Budget Rent-A-Car receipt from Miami, Florida, which was dated February 18, 1978, as well as an invoice from a printing firm in Florida; this last item Agent Lakin says he took from Mr. Dameron's personal bedroom (T.E., pp. 347-349).

Further, Agent Lakin said he seized some handwritten notes with a formula and mathematical calculations on it (T.E., p. 349). One of the elements mentioned in the handwritten notes is cyclohexanone, which Agent Lakin says is a chemical used in the manufacture of PCP; no other chemical other than piperidine was ever found in Mr. Dameron's possession (T.E., p. 350). The federal agents found absolutely no drug equipment, utensils, or any other object in Mr. Dameron's possession which could be used to manufacture phencyclidine.

Agent Lakin testified that there was nothing illegal about the possession of any of the items in the petitioner's residence (T.E., pp. 394-395). Specifically,

Agent Lakin testified that he had no knowledge of anything improper occurring within James Dameron's residence after April 4, 1978 (T.S., p. 396).

None of the bottles of piperidine seized from the petitioner's residence had been opened (T.E., p. 398).

No other chemical other than piperidine was present at the petitioner's residence or in his possession (T.E., pp. 398-399). Lakin only found references to other chemicals in a book or on a piece of paper (T.E., p. 399).

Agent Lakin found nothing extraordinary in the tools or equipment in the Dameron residence; Agent Lakin admitted that the tools found were the ordinary tools one would find around an ordinary man's home (T.E., p. 401).

Part of the literature Lakin found in the Dameron residence was the *U. S. News* and *World Report* which dealt with the drug PCP. With only the chemical piperidine nothing else can be made (T.E., p. 403).

The Trial Court erroneously overruled the Petitioner's Motion for Judgment of Acquittal (T.E., pp. 607-641).

Prior to trial of this action, petitioner moved the District Court to suppress the fruits of the search made pursuant to warrant on the grounds that the information which formed the basis for the affidavit was itself the product of illegal search by Officers Jesse and Fisher of the Flatwoods City Police.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant the Writ Prayed for Herein in Order to Rule On the Question of Whether a Warrantless Search By a Law Enforcement Officer Who Gains Entry to a Home By Fraud, Deceit or Trickery, Violates the Fourth Amendment Such That the Fruits Thereof Should Be Suppressed.

As cited above, agents of the United States conducted a search of petitioner's home pursuant to a search warrant issued by the United States Magistrate. The basis of the search warrant was the affidavit of a government agent. The information contained in that affidavit consisted primarily of the observations of two city police officers who entered petitioner's home under guise of being interested in purchasing the house. It is the clearly settled rule that where a search is conducted pursuant to a warrant, which warrant was procured by an affidavit based upon the fruits of a prior illegal search, the fruits of the search pursuant to warrant must be suppressed upon timely motion. *United States* v. *Langley,* 466 F. 2d 27 (C.A. 6th Cir., 1972). In that case, the court stated that the fruits of the search must be suppressed "where such tainted information comprises more than *a very minor portion* of that found in an affidavit supporting a warrant to search."

Therefore, the question presented to the trial court and the Court of Appeals was whether or not the warrantless search by two police officers fell within one of the exceptions to the warrant requirement of the Fourth Amendment. As with every warrantless search, the heavy burden rests with the government to establish

that the search fell within one of the few specifically established and well-delineated exceptions to the warrant requirement. See *Coolidge* v. *New Hampshire,* 403 U. S. 454, 91 S. Ct. 2022, 29 L. Ed. 564 (1971).

The Court of Appeals in this case has apparently misapplied the Supreme Court's holdings in *Lewis* v. *United States,* 385 U. S. 206 (1966), and *Hoffa* v. *United States,* 385 U. S. 293, and has reached a conclusion contradictory to the rule in several other circuits as announced in *Fraternal Order of Eagles* v. *United States,* 57 F. 2d 93 (3rd Cir., 1932), *United States* v. *Phillips,* 497 F. 2d 1131 (9th Cir., 1974), and *Gatewood* v. *United States,* 209 F. 2d 789 (C.A.D.C., 1953). Further the holding of the Court of Appeals is contrary to the principle announced by the Supreme Court in *Gould* v. *United States,* 255 U. S. 298 (1921).

The United States in brief cited *Hoffa,* and *Lewis* to the Court as standing for the general proposition that a law enforcement officer's gaining of entry into a dwelling under ruse or false pretense is not objectionable and permits the officer to circumvent the warrant requirements of the Fourth Amendment. In fact, the court's holding in those cases is clearly more limited. In *United States* v. *Ressler,* 536 F. 2d 208 (7th Cir., 1976), the court drew that distinction by pointing out that in both *Lewis* and *Hoffa* the government agent was an undercover agent invited onto the premises for the express purpose of observing and participating in the illegal activities. The rationale of the *Hoffa* and *Lewis* cases is that the defendant was not deceived as to the purpose of the agent's entry, but rather by his mis-

placed belief that the agent would not report his observations to law enforcement agencies.

When properly distinguished in this manner, neither *Hoffa* or *Lewis* serve to abrogate the rule announced by the Supreme Court in *Gould* v. *United States,* 255 U. S. 298 (1921) wherein the court stated:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.
>
> Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and

> secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative."

In *Fraternal Order of Eagles, supra,* the Court held that where law enforcement agents gained entry into a private club by falsely representing themselves to be members of an affiliated organization in another city and upon entry observed illegal sale of liquor, the agents actions constitute an unlawful search.

In *Gatewood, supra,* the court held that a search pursuant to an entry gained when officers announced themselves to be from Western Union, constituted an unlawful search.

The Ninth Circuit undertook to distinguish *Lewis* in *United States* v. *Phillips, supra,* wherein uniformed police officers gained entry into defendants office by announcing that they were investigating a burglary. Again the court noted that the operative language of *Lewis* as stated both in the majority opinion and the concurring opinion of Justice Brennan is that the agent entered "for the very purpose contemplated by the occupant," p. 211. Since in *United States* v. *Phillips* the officers did not enter for the purpose contemplated by the occupant, to investigate a burglary, their entry and resulting search were unlawful.

The limited scope of the use of deception authorized by *Hoffa* and *Lewis* permits law enforcement agencies to make full use of undercover agents in the enforcement of the law without giving them unbridled authority to invade privacy and security. This court

should review this action in order to prevent this misapplication of its prior decisions in order to justify search by fraud and deceit generally.

It is interesting to note in this case that in its brief, the government argues that prior to having directed city Police Officers to enter petitioner's home on a false pretense to conduct a search, the D.E.A. already had sufficient evidence with which to procure a warrant. If this is correct, it is frightening to imagine that the Court of Appeals appears to be holding that the government may enter the home of a private individual on a ruse even where there is no reason why it could not have applied to the court for a warrant as contemplated by the Constitution.

B. The Proof At Trial Even When Taken in a Light Most Favorable to the Government Fails to Constitute an Attempt as Described By 21 *U.S.C.* §846.

The question of distinguishing attempt from mere preparation is a difficult one not subject to precise simple definition. This court has never articulated a definition for attempt since the enactment of 21 *U.S.C.* §846. No directive by Congress that the Courts must apply a less stringent meaning of the concept of attempt is found in the statute. There is no suggestion that an evil thought can be punished. If so, it should be spelled out.

It has been argued by petitioner that no court erred in not directing a verdict of acquittal in this case, since the only evidence offered by the United States was in effect, that James Dameron had purchased one of the

chemicals used in the manufacture of P.C.P., that he had in his possession some printed material, all of which was available to the public, including magazines and copies of public records, and that he had employed an assumed name at various times.

In *United States* v. *Mandujano,* 499 F. 2d 370 (5th Cir., 1974), the Fifth Circuit catalogued some of the various opinions and attempts at defining the line between preparation and attempt. The Fifth Circuit adopted a definition of attempt which employs the term substantial step as a prerequisite for an attempt. That substantial step must be one strongly corroborative of the firmness of the defendant's criminal intent. It is this definition which the United States in its brief urged the court to adopt.

Petitioner submits that a definition such as given in *Mandujano* is so vague and broad as to say very little. Prosecutions for attempt under such a definition becomes a dangerous thing in effect allowing prosecution of a defendant for his state of mind rather than for any act.

In the case of *United States* v. *Roman,* 356 F. Supp. 434 (S.D.N.Y., 1973), the court in discussing attempt employed language from the Model Penal Code which petitioner urges this court to adopt as an appropriate definition of attempt, specifically that a person is guilty of attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be.

In this case, the danger of prosecuting a person for what his mental state is believed to be is clearly demonstrated. The United States made much of the fact that Petitioner possessed reading material such as government patents which are public records, and commercial publications such as weekly news magazines. It is submitted that petitioner had absolute right to have and to read these materials. To infer a sinister motive from the possession of publications is itself a sinister thing. Moreover, there is not and the government does not contend that there is any prohibition whatsoever against the purchase of piperidine. In fact, there are several uses for the substance.

The sum of the government's case is that Mr. Dameron bought a chemical which can be purchased by any individual and that he acted in a strange manner from what is usually the conduct in the community. Unusual behavior is simply not a crime.

Argument has been made by the United States that a definition of attempt such as that urged by the petitioner would result in making enforcement of drug laws more difficult. However, the government has at its disposal the means to make the possession of piperidine a crime itself, thus achieving the desired preventative result without allowing the government to explore the possible evil intent of private citizens who have committed no substantive wrong.

The definition of attempt given in *Mandujano* in effect states that the mental state itself is the crime and there need be only sufficient overt acts to draw a strong inference as to the state of mind. Petitioner strongly

urges that this court reject the substantial step doctrine and adopt a position consistent with urged by petitioner.

Regardless of what one may believe Dameron would have done eventually, he did not attempt to make P.C.P., and in fact took very few steps consistent with the making of P.C.P.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 78-5411; 78-5452

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES C. DAMERON A/K/A JAMES CORBIN, - *Defendant-Appellant,*

ORDER—Entered July 5, 1979

BEFORE: LIVELY and KEITH, Circuit Judges, BROWN, District Judge*

After a jury trial, Appellant was convicted on a one-count indictment charging him with attempting to manufacture, distribute and dispense, and possess with intent to manufacture, distribute and dispense, Phencylidine ("PCP") a Schedule II non-narcotic, controlled substance in that he knowingly and unlawfully possessed Piperidine, an essential precursor to the manufacture of PCP, in violation of 21 U.S.C. §846.

Upon due consideration of the record on appeal, the briefs and oral arguments of counsel for the parties and being fully advised in the premises, the Court is of the view that appellant's allegations of error are without merit.

Therefore, it is ordered that Appellant's conviction be, and the same hereby is, affirmed.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

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*Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 78-5411; 78-5452

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES C. DAMERON A/K/A JAMES CORBIN, - *Defendant-Appellant,*

ORDER—Entered September 11, 1979

BEFORE: LIVELY and KEITH, Circuit Judges, and BROWN, District Judge*

Upon consideration of the petition for rehearing filed herein by appellant, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be, and the same hereby is, denied.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

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*The Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

No. 79-577

DEC 14 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES DAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-577

JAMES DAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.). The judgment of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1979 (Pet. App. 23). A petition for rehearing was denied on September 11, 1979 (Pet. App. 24). The petition for a writ of certiorari was filed on October 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when police officers gained entry into his home, which was being held open for sale, under the pretext of being prospective home buyers.

2. Whether there was sufficient evidence to prove that petitioner committed a criminal attempt.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky petitioner was found guilty of attempting to manufacture, possess and dispense phencyclidine (PCP), a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment to be followed by a special parole term of two years. The court of appeals affirmed without opinion (Pet. App. 23).

The evidence adduced at trial, which was uncontroverted, showed that the "Corbin Company"[1] placed an order with a chemical supplier for the purchase of an unusually large quantity of piperidine, a chemical essential to the manufacture of PCP. The order had been prepaid by cashier's check, rather than a check drawn on a corporate account (Tr. 210),[2] and the purchaser left only the telephone number and address of an answering service.[3] Alerted by the chemical supplier, DEA agents established surveillance near the shipping area of the supply company and awaited the arrival of the purchaser. A short time later, the agents saw petitioner arrive in a pick-up truck that had signs taped to each door bearing the name "Corbin Company." Petitioner, posing as "Jim Corbin", took delivery of the piperidine

[1]Investigation revealed that the "Corbin Company" was a fictitious corporation (App. 215).

[2]"Tr." refers to the trial transcript. "App." refers to the appendix filed by petitioner in the court of appeals.

[3]Petitioner, who tendered payment to the answering service in cash, had refused to divulge information normally given by a prospective customer (App. 137).

and drove off. A license plate check showed the plates to have been issued for a different vehicle. Following the vehicle, the agents saw petitioner pull off to the side of the road and remove the Corbin Company signs from the truck doors. Petitioner then removed the bogus license plate, which in fact was lost or stolen, replacing it with a plate bearing a different number. This plate was registered to petitioner (App. 197-204). The agents then followed petitioner to his home. DEA agents later confirmed that calls had been placed from petitioner's telephone to the telephone answering service used by the Corbin Company (App. 132, 133, 154).

Thereafter, two Flatwoods, Kentucky, police officers, who were working in cooperation with DEA agents, went to petitioner's residence, which was being held open for sale. Accompanied by a realtor, the two officers, both of whom were in uniform (App. 64-65), were admitted by petitioner to tour his house as prospective purchasers. During this inspection tour, the officers verified that cartons of piperidine were being stored in a closet in petitioner's house. (App. 63-64, 78-82).

A search warrant was then obtained to search petitioner's truck and residence. In the truck, the agents found a number of items substantiating that it was petitioner who had purchased the chemical piperidine posing as Jim Corbin of the Corbin Company (App. 230-239). During the search of petitioner's house, the agents seized the ten cartons of piperidine[4] (App. 243), as well as a number of documents, publications, and handwritten notes (App. 249-250). All of the various notes,

[4]A DEA expert testified that the quantity of piperidine purchased by petitioner would be sufficient to produce at least 12 million dosage-units of PCP and that each dosage-unit would sell for one dollar on the street (App. 206-214).

documents and publications related to the manufacture of PCP or to the surreptitious purchase of the piperidine (App. 250-277, 338-355). In addition, many of the seized items revealed the considerable planning in which petitioner had engaged to create the fictitious identity of Jim Corbin and the Corbin Company (App. 260-266).

Finally, it was learned that petitioner, who was a guard at a federal penitentiary, actively solicited information from the inmates concerning the manufacture of PCP. Thus, one prisoner advised petitioner to create a front-company to handle the purchase of piperidine, explaining that it was during the purchase of this indispensible chemical that drug traffickers frequently were caught (App. 109-111). Another inmate testified that he was asked by petitioner to secure a "kitchen formula" for manufacturing PCP (App. 118-121).[5]

ARGUMENT

1. Petitioner contends (Pet. 14-18) that his Fourth Amendment rights were violated when uniformed police officers gained entrance into his home under the pretext of being prospective home buyers. Because of this, petitioner claims that evidence of the officers' observation of piperidine, as well as the various items seized in the subsequent warranted search of his residence, must be suppressed as the fruit of the officers' illegal entry. In closely analogous situations, however, this Court has recognized that the Fourth Amendment is not violated when law enforcement officers fail to disclose or

[5]This "kitchen" method, as experts explained at trial, is the easiest and cheapest way to synthesize PCP. With this method, any reasonably intelligent individual who has a formula can manufacture PCP with no more equipment than plastic buckets (App. 212, 333-335).

misrepresent their status or motive in order to obtain consent to enter an otherwise constitutionally protected area. See *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, 385 U.S. 293 (1966).

In *Hoffa*, an informant who was an acquaintance of the defendant gave incriminating testimony based on information gained during his frequent visits to the defendant's hotel suite. Rejecting a claim that the defendant's consent was vitiated because the informant had not disclosed his actual role and purpose in making his visits, the Court stated (385 U.S. at 302; footnote omitted):

> [I]t is evident that no interest legitimately protected by the Fourth Amendment is involved. * * * [The informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing.

Similarly, in *Lewis*, a narcotics agent was invited into the defendant's residence after misrepresenting his identity and expressing a willingness to purchase drugs. Noting that at no time "did the agent see, hear, or take anything that was not contemplated * * * by petitioner," the Court held that it was not constitutionally impermissible for a government agent to use deceptive tactics to gain admission to a suspect's home, since "[a] government agent, in the same manner as a private person, may accept an invitation to * * * enter upon the premises for the very purposes contemplated by the occupant" (385 U.S. at 210-211). See also *United States* v. *Ressler*, 536 F. 2d 208, 211 (7th Cir. 1976).

Here, petitioner held his home open for sale, and the officers were invited into his home as prospective home buyers. Since the officers were uniformed, petitioner—unlike the defendants in *Hoffa* and *Lewis*—was not misled concerning the officers' identities, but only as to their purpose. Hence, he could easily have denied the officers entrance if he objected to their presence in his home.[6] See *Brown* v. *Brierley*, 438 F. 2d 954 (3d Cir. 1971). Nor was the officers' post-entry conduct violative of the Fourth Amendment, for they inspected no areas that petitioner could have assumed would not have been visible to persons he invited into his house to inspect it with a view to buying it. Thus, the realtor who escorted the two officers through petitioner's home testified that their conduct was what one might expect of prospective home buyers (App. 45). In particular, she explained that a realtor would normally expect a prospective buyer to open closets; and she indicated that once the closet door in question was open, the cartons of piperidine were clearly in view (App. 42, 45-46).[7]

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[6]This case is thus entirely different from *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), where officers gained entry by a misrepresentation regarding their *official* right to be admitted.

[7]Because petitioner could expect that members of the public whom he invited into his home might see the items in question, the decision here is not, as petitioner contends (Pet. 15-17), at odds with this Court's decision in *Gouled* v. *United States*, 255 U.S. 298 (1921). As the Court explained in *Lewis* v. *United States*, *supra*, 385 U.S. at 209-210, *Gouled* involved a proper (albeit deceptive) entry that was rendered invalid when the invitee conducted a "secret and general ransacking" of the defendant's private papers.

The other cases relied upon by petitioner are equally inapposite. For instance, in *United States* v. *Phillips*, 497 F. 2d 1131 (9th Cir. 1974), government agents tricked their way into a building for the prohibited purpose of consummating a warrantless arrest of an individual without probable cause to believe that he was actually in the building. Unlike here, the agent's activities inside the building were in no way confined to the sort of conduct reasonably contemplated by the building's occupants. See *id.* at 1134-1135; cf. *Gouled* v. *United States*, *supra*. In *Gatewood* v. *United States*, 209 F. 2d 789 (D.C. Cir. 1953), police officers resorted to a forced entrance to gain admission into a residence after an attempt to gain entry by means of a ruse had failed (*id.* at 790). Finally, in *Fraternal Order of Eagles, No. 778* v. *United States*, 57 F. 2d 93 (3d Cir. 1932), the court invalidated a warrant which was predicated on information gained by prohibition officers who had previously secured entry into a private club by falsely representing themselves as members of the order, *i.e.*, not as members of the general public who could not be relied on to conceal violations from the authorities.

By leaving the cartons of piperidine in a place where they could readily be seen while his house was open to inspection by prospective purchasers, petitioner knowingly exposed their presence to outsiders and assumed the risk that it might be reported to government authorities. See *United States* v. *Guidry*, 534 F. 2d 1220, 1221-1222 (6th Cir. 1976) (upholding entry and plain view observations of an agent who was admitted as a repairman's "helper"); *State* v. *Anglada*, 144 N.J. Super. 358, 365 A. 2d 720 (1976) (entry gained and information about criminal activity elicited by officers posing as prospective home buyers). Because he did so, the officers' observation of the cartons cannot be characterized as the consequence of an unlawful search.[8]

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[8]In any event, there is no occasion to suppress the fruits of the warranted search, even assuming, *arguendo*, that the officers' entry and subsequent inspection of petitioner's residence were improper. Even before the officers' entry, law enforcement agents knew that petitioner had purchased a large quantity of piperidine through use of a fictitious identity, and that petitioner had driven his truck to his residence after he had picked up the piperidine. This information was more than sufficient to establish probable cause to search petitioner's house and truck, and the additional information gained through the officers' deceptive entry, which pin-pointed the piperidine's exact location in the house, added nothing significant to a determination of probable cause. Because of this, the search

2. Petitioner argues that his purchase of piperidine and accumulation of printed materials relating to the manufacture of PCP were, at most, merely preparatory to his engaging in any illicit drug operation. Therefore, he contends (Pet. 18-21), the evidence was insufficient to prove a criminal attempt under 21 U.S.C. 846.

Although we agree that preparation alone does not constitute an attempt, it does not follow that petitioner was required to have done every possible act short of actually beginning the manufacturing process in order to be liable under the attempt statute here. See generally *United States* v. *Coplon*, 185 F. 2d 629, 633 (2d Cir. 1950). Rather, as noted in *United States* v. *Stallworth*, 543 F. 2d 1038, 1040 (2d Cir. 1976), "Attempt is a subtle concept * * * that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled." Accordingly, there is "fundamental agreement" that a punishable attempt occurs whenever a defendant acts with the requisite intent to commit the underlying offense and engages in conduct constituting a "substantial step" towards commission of the offense. See *United States* v. *Mandujano*, 499 F. 2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). See also *United States* v. *Jackson*, 560 F. 2d 112, 117-121 (2d Cir.), cert. denied,

warrant and the subsequent seizures were valid at all events. See *United States* v. *Marchand*, 564 F. 2d 983, 993-994 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (collecting cases); *United States* v. *Grunsfeld*, 558 F. 2d 1231-1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977); cf. *Franks* v. *Delaware*, 438 U.S. 154, 156 (1978).

434 U.S. 941 (1977); *United States* v. *Stallworth*, *supra*, 543 F. 2d at 1040-1041; *Model Penal Code* §5.01(1)(c) (Proposed Official Draft (1962)).[9]

Petitioner does not dispute the intent element, and the evidence was otherwise sufficient to show that petitioner took a substantial step towards the manufacture of PCP. Thus, as we have detailed above (pages 2-3 *supra*), the evidence at trial showed that petitioner, acting through a fictitious corporation, purchased an extraordinarily large quantity of piperidine, a chemical for which there are few legitimate uses (see App. 326-355) and which is the rarest (App. 209-212) and most essential component of PCP (App. 310, 332). In addition, petitioner amassed a large number of notes and documents relating solely to the manufacture of PCP. An expert concluded that from the information contained in these materials, a knowledgeable person with access to the needed chemicals could synthesize PCP. More importantly, these materials could not be employed in the preparation of any other commonly known or commercially used substance (App. 355).[10] Finally, petitioner actively solicited information from prison inmates regarding the

[9]In *Jackson*, *supra*, 560 F. 2d at 119, the court recognized that

> [T]his formulation shifts the emphasis from what remains to be done * * * to what the actor *has already done*. The fact that further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial [quoting *Model Penal Code* §5.01, Comment at 47 (Tent. Draft No. 10, 1960).

Because the "substantial step" test is included as one of the alternative tests in the Model Penal Code's definition of attempt, petitioner's reliance on the Model Penal Code in his attack (Pet. 19) on that test is ill-founded.

[10]Petitioner, as a prison guard, could have had no lawful use for such an amount of piperidine. See *Model Penal Code*, *supra*, §5.01(2)(e).

surreptitious manufacture of PCP, including the acquisition of the "kitchen formula" with which petitioner would only need to employ ordinary household utensils to produce the illicit compound.

In short, by the time of his apprehension, petitioner had already taken the most significant steps towards the illegal manufacture of PCP by acquiring massive amounts of piperidine and the technical information needed to produce PCP. In these circumstances, petitioner's conviction under 21 U.S.C. 846 was wholly justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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